

SEP 11 1983

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In The

# Supreme Court of the United States

October Term, 1983

GEORGE L. KARAPINKA,

*Petitioner,*

vs.

UNION CARBIDE CORPORATION and UNITED STATES  
DISTRICT JUDGE DICKINSON R. DEBEVOISE,

*Respondents.*

*On Petition for Writ of Certiorari to the United States Court  
of Appeals for the Third Circuit*

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## BRIEF OF RESPONDENT UNION CARBIDE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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**Supreme Court of the United States**

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**BRIEF OF RESPONDENT UNION CARBIDE  
CORPORATION IN OPPOSITION TO PETITION FOR A  
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**QUESTION PRESENTED**

Whether the court of appeals properly denied petitioner's petition for a writ of mandamus seeking to compel the district court to hear petitioner's summary judgment motion more than one year after the case had been dismissed with prejudice.

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## **OPINIONS BELOW**

Respondent respectfully submits that the opinions below are adequately identified in the petition.

## **JURISDICTION**

Respondent respectfully submits that the facts relating to this Court's jurisdiction are adequately set forth in the petition only insofar as petitioner seeks review of the denial of his petition for a writ of mandamus. Respondent respectfully submits that this Court does not have jurisdiction over appeal No. 81-2941 of the Court of Appeals for the Third Circuit, and the earlier proceedings in Civil Action No. 81-1393 of the District Court for the District of New Jersey. 28 U.S.C. §2101(c).

## **STATUTORY PROVISIONS AND RULES**

### **Statutes**

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2 *et seq.*, provides in relevant part:

#### **Employer practices**

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

The Judicial Code and Judiciary Act, 28 U.S.C. §2101 states:

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

## Rules

Fed. R. Civ. P. 54 states:

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 56 states:

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

Local Rule 13B of the United States District Court for the District of New Jersey provides:

The time within which to answer or reply may, before its first expiration and with or without notice, be extended once for not to exceed fifteen days on order granted by the clerk. Any other extension of time must be approved by the court.

### STATEMENT OF THE CASE

Petitioner George L. Karapinka ("Karapinka") seeks to have this Court review the denial of his petition for a writ of mandamus by the Court of Appeals for the Third Circuit, which writ of mandamus sought to compel the Honorable Dickinson R. Debevoise, United States District Judge for the District of New Jersey, to hear a motion for summary judgment filed more than one year after the case was dismissed by the district court.

Within the guise of this petition for a writ of certiorari, petitioner also seeks to have this Court review numerous discretionary actions taken by both the District Court for the District of New Jersey and the Court of Appeals for the Third



Circuit in proceedings below.<sup>1</sup> Defendant-respondent Union Carbide Corporation ("Union Carbide") believes it unnecessary to address the issues raised concerning the district court's and the court of appeals' actions, as they were not properly the subject of review by the court of appeals in denying the writ of mandamus and accordingly are improperly raised by Karapinka in this petition for a writ of certiorari. Moreover, the petition for a writ of certiorari is untimely to the extent that Karapinka seeks review of prior decisions of the district court and the court of appeals which were issued more than ninety days prior to the filing of the petition.

The complaint in this matter was filed on May 6, 1981, with service effected on Union Carbide on June 12, 1981. The complaint alleges that Karapinka was discharged from employment by Union Carbide in 1971 (some ten years previously) on the basis of his national origin (Ukrainian) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.* (A1).<sup>2</sup>

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1. The district court's actions which Karapinka incorrectly challenges in his petition include the district court's earlier refusal to enter summary judgment in his favor (although a motion for summary judgment was never made by Karapinka prior to the summary judgment motion at issue here) (Petition, pp. 30-31), the district court's denial of Karapinka's motion for judgment by default (Petition, pp. 28-29), and the entry of the order on mandate dated January 10, 1983 (Petition, pp. 32-33). The court of appeals' actions which Karapinka incorrectly challenges include the granting of Union Carbide's motion to file a supplemental appendix in the prior appeal taken in this case from which a petition for a writ of certiorari was filed and subsequently denied by this Court (Petition, p. 32).

2. All "SA" references are to the supplemental appendix submitted to the court of appeals by Union Carbide in appeal No. 81-2941. All "A" references are to Karapinka's appendix filed with his brief in that same appeal. Both appendices were designated by Karapinka to be certified and transmitted to this Court by the court of appeals as part of the record below. All "PA" references are to Karapinka's appendix included with his prior petition for a writ of certiorari, No. 82-664. All "KA" references are to the appendix included in the current petition for a writ of certiorari.

On July 17, 1981 (after receiving an extension from the district court pursuant to its Local Rule 13B) Union Carbide filed a motion to dismiss or for summary judgment (in lieu of an answer), with a supporting brief and affidavit (A12, A13, A17). Karapinka then served a brief in opposition to Union Carbide's motion along with his affidavit (A31, A27). Subsequent to the filing of the brief in opposition, Karapinka also filed a "Motion to Dismiss the Defendant's Motion" (A42).

On September 22, 1981, Union Carbide's attorneys notified the district court that it would withdraw its motion to dismiss and would serve its answer to the complaint by October 2, 1981 (10 days therefrom; *see* A48-49). The district court confirmed the withdrawal of Union Carbide's motion to the parties in writing and stated that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A44).

On October 2, 1981, Union Carbide served its answer to the complaint, which was filed on October 5, 1981 (SA6). Additionally, on October 2, 1981, Union Carbide served Karapinka with a notice to take oral deposition and to produce documents, scheduling Karapinka's deposition for October 22, 1981.

Karapinka served a motion for judgment by default on September 24, 1981. That motion was scheduled to be heard on October 19, 1981.

On October 5, 1981, Karapinka filed an amendment to his motion to dismiss Union Carbide's motion (previously declared moot by the district court) seeking expenses allegedly incurred in responding to that motion (A52).

Also on October 5, 1981, the district court stated on the record that Union Carbide's motion for summary judgment had been withdrawn and that Karapinka's cross-motion to dismiss Union Carbide's motion was thereby rendered moot (A66).

Karapinka's motion for judgment by default was heard and decided on October 19, 1981 (A67). The district court denied that motion.

The order denying Karapinka's motion for judgment by default was signed by Judge Debevoise on October 21, 1981, but was not filed until November 2, 1981 (SA15). On October 26, 1981, Karapinka served a motion for reargument concerning the October 19, 1981 hearing (A60). In his motion papers Karapinka complained that the proposed order did not mention Union Carbide's motion to dismiss (which had previously been withdrawn). Additionally, he stated that his brief and affidavit in response to Union Carbide's withdrawn motion to dismiss contained "counterclaims" for summary judgment in his favor and asked the district court to consider these "counterclaims".

Union Carbide opposed the motion for reargument (SA17). The district court, in a letter to the parties, and by order dated November 5, 1981, denied Karapinka's motion for reargument (SA21, SA22), and also amended the order filed November 2, 1981, including therein denial of Karapinka's "motion" for summary judgment (SA22).

Karapinka filed a notice of appeal to the Court of Appeals for the Third Circuit on October 30, 1981 (A64). The appeal was taken from the district court's order denying Karapinka's motion for judgment by default, and the decision of the district court allowing Union Carbide to withdraw its motion to dismiss.

In an order dated November 9, 1981, Judge Debevoise informed the parties that the case would proceed in the district court notwithstanding the pendency of the appeal, it appearing that the order from which the appeal was taken was manifestly not an appealable one.

On November 16, 1981, the district court heard oral argument on Union Carbide's motion to compel plaintiff to appear for oral deposition and for costs and attorneys' fees. This motion was filed by Union Carbide in light of Karapinka's refusal to appear for deposition as noticed on October 22, 1981 and November 4, 1981. At the hearing, Karapinka asserted that he did not believe he had to appear for deposition or proceed with discovery in light of the pendency of his appeal.

The court instructed Karapinka that the case was to go forward at the district court level irrespective of the appeal (which Judge Debevoise indicated was not properly taken). Judge Debevoise stated that the original record was to be kept in the clerk's office (with a copy forwarded to the Third Circuit) so that the case could proceed and discovery could be taken. Additionally, Judge Debevoise informed Karapinka that he was required to appear for his deposition on December 1, 1981, at the courthouse (in deference to Karapinka's arguments about appearing at counsel's office). The court instructed Union Carbide to send a deposition notice to Karapinka providing for same. He informed Karapinka that if December 1 was not a convenient date, he was to telephone Union Carbide's attorneys with alternate dates.

Karapinka did not appear for deposition on December 1, 1981. Based on Karapinka's continued refusal to appear for deposition, to proceed with discovery and to accept service of papers on him,<sup>3</sup> and in light of his direct defiance of the court's orders, Union Carbide filed a motion to dismiss the action and for costs and attorneys' fees, with supporting affidavits of Edward

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3. Karapinka continually refused to accept service of papers on him and during the course of the litigation returned, among other pleadings, the answer to the complaint, notices to take deposition and requests for production of documents.

P. Lynch and Jill R. Lerner. Karapinka served an answer in opposition to the motion to dismiss on December 8, 1981.

The motion to dismiss was heard on December 21, 1981. Judge Debevoise, after detailing the history of the litigation and indicating Karapinka's direct defiance of his prior orders, granted Union Carbide's motion to dismiss with prejudice. Judge Debevoise indicated that Karapinka acted in total, wilful disregard of the court's instructions and that Karapinka persisted in so doing. Accordingly, the case was dismissed with prejudice by order dated December 23, 1981.

Subsequent to the parties being notified by the court of appeals that Karapinka's pending appeal would be heard without oral argument, Karapinka filed a motion for oral argument (KA14). By order of the court of appeals dated June 24, 1982, this motion was denied.

By order dated June 25, 1982, the court of appeals properly determined that Karapinka's appeal was from a non-appealable order and accordingly dismissed the appeal (PA1).<sup>4</sup>

By order dated July 21, 1982, the court of appeals denied Karapinka's petition for rehearing.

On August 5, 1982, Karapinka served a motion in the court of appeals seeking the opinion on which the order dismissing his appeal was based. By order dated August 23, 1982, that motion was denied on the grounds that the court rendered its decision without an opinion (PA2, 3).

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4. By the same order, the court of appeals granted Union Carbide's motion to file a supplemental appendix which contained, *inter alia*, the relevant docket entries in the district court and the order and amended order from which Karapinka was appealing.

On October 18, 1982, Karapinka filed with this Court a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit concerning the Third Circuit's dismissal of his appeal. Union Carbide filed a brief in opposition to the petition for a writ of certiorari on November 17, 1982. The petition for a writ of certiorari was denied by this Court on December 6, 1982.

A certified judgment in lieu of formal mandate was issued by the Third Circuit on December 8, 1982. A motion to dismiss appellee's bill of costs, filed by Karapinka with the Third Circuit on December 15, 1982, was denied on January 11, 1983. An order on mandate was filed by the district court on January 10, 1983.

Karapinka filed a motion to vacate the district court's December 23, 1981 order dismissing the case and the January 10, 1983 order on mandate, which motion was served on January 17, 1983 along with a supporting affidavit. Union Carbide submitted a memorandum in opposition to Karapinka's motion to vacate on February 9, 1983. By order dated March 1, 1983, the district court denied Karapinka's motion to vacate the December 23, 1981 and January 10, 1983 orders of the court.

On March 3, 1983, Karapinka served a motion for summary judgment and supporting affidavit in the district court. Union Carbide served a brief in opposition to the motion for summary judgment on March 14, 1983. The district court denied Karapinka's motion for summary judgment by order dated March 28, 1983 (KA4).

On March 7, 1983, Karapinka served a motion for reargument of the motion to vacate the December 23, 1981 and January 10, 1983 orders of the district court. Union Carbide filed a statement in opposition to the motion for reargument on March 14, 1983.

In light of Karapinka's continuous filing of motions in the district court well over one year after the case was dismissed, Union Carbide served a notice of motion for costs, attorneys' fees and injunctive relief with a supporting brief and affidavit of Edward P. Lynch on March 18, 1983. Karapinka served an answer in opposition to the motion for costs, attorneys' fees and injunctive relief on March 29, 1983. On April 12, 1983, the district court granted Union Carbide's motion for injunctive relief, preventing Karapinka from filing any further motions in the district court without prior approval of the court. At oral argument on April 11, 1983, the court also ruled on Karapinka's motion to rule on the motion for reargument dated April 11, 1983 (seeking reargument of the motion to vacate the December 23, 1981 and January 10, 1983 orders of the district court), thereby denying the motion for reargument.

On April 5, 1983, Karapinka served a petition for a writ of mandamus in the United States Court of Appeals for the Third Circuit, seeking to compel Judge Debevoise to hear oral argument on the motion for summary judgment served on March 14, 1983.

Karapinka's motion for reargument of Union Carbide's motion for costs, attorneys' fees and injunctive relief, treated by the district court as a motion for approval to file such a motion, was denied on May 2, 1983.

Karapinka served a motion to vacate the district court's order of March 28, 1983 (denying summary judgment), along with a supporting brief on April 26, 1983. This motion was opposed by Union Carbide in a letter to Judge Debevoise dated May 3, 1983.

On May 6, 1983, Karapinka served a motion for leave to file an amendment to the complaint, which motion was opposed by Union Carbide by letter dated May 13, 1983. The motion for

leave to file an amended complaint, treated by the district court as one for approval to file such a motion, was denied on May 17, 1983.

On May 12, 1983, the United States Court of Appeals for the Third Circuit denied Karapinka's petition for a writ of mandamus (KA1).

### **SUMMARY OF ARGUMENT**

Karapinka has failed to identify issues of law which would, under Sup. Ct. Rule 17, justify the grant of a writ of certiorari. Rather, his petition seeks to have this Court create exceptions to well established principles which the court of appeals applied in denying his petition for a writ of mandamus.

### **ARGUMENT**

#### **I.**

**The court of appeals properly denied Karapinka's petition for a writ of mandamus seeking to compel the district court to hear an improper and untimely motion for summary judgment.**

The court of appeals, in its order dated May 12, 1983, denied Karapinka's petition for a writ of mandamus. By that writ Karapinka sought to compel the district court to hear oral argument on a summary judgment motion filed more than one year after the case was dismissed. Karapinka now claims that the court of appeals was in error in denying his petition for a writ of mandamus. As set forth below, the court of appeals acted properly and in accordance with clearly established precedent in denying that petition.

By order of the district court dated December 23, 1981, this case was dismissed with prejudice. No appeal was taken from



that final order. On February 28, 1983, Karapinka filed an untimely motion to vacate the December 23, 1981 order of dismissal, which motion was denied. Thus, the order of dismissal remains final and undisturbed.

On March 3, 1983, Karapinka served a motion for summary judgment in the district court seeking judgment on the dismissed claims. In his motion papers, Karapinka ignored the fact that the case had been dismissed by the district court. Further, he made no attempt to explain the procedural basis for his motion, as indeed he could not. Since this case had been dismissed with prejudice, the district court properly denied Karapinka's subsequent motion for summary judgment. Accordingly, the Court of Appeals for the Third Circuit properly dismissed Karapinka's petition for a writ of mandamus seeking to compel the district court to hear oral argument on the summary judgment motion, and rule on the merits.

The remedy of mandamus is a drastic one, invoked only in extraordinary situations. It has been held that the remedy is to be invoked by the court of appeals only where the district court has acted outside the scope of its judicial power. Additionally, it is required that the party seeking issuance of the writ have no other adequate means to attain the desired relief. Further, the party seeking the writ has the burden of showing his right to issuance is clear and indisputable. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33 (1980); *Will v. United States*, 389 U.S. 90 (1967).

In the present case, Karapinka has not met any of the burdens set forth above which would require the court of appeals to grant his petition for a writ of mandamus. With regard to the issue of judicial power, it is clear that the district court had the power to deny Karapinka's motion for summary judgment filed more than one year after the case was dismissed with prejudice.

Further, Karapinka ignored his right to file an appeal with regard to the dismissal of his cause of action. Thus, he passed up the means available to attain the relief he now seeks, even after the district court specifically advised him of his right to file an appeal from the order of dismissal at oral argument on the motion to dismiss (*see* opinion of Judge Debevoise dated December 21, 1981). Since Karapinka failed to pursue the appellate procedures then properly available to him, the issuance of the writ is totally unwarranted.

Finally, Karapinka's contention that the district court was without jurisdiction to dismiss his case in December, 1981 because he had filed a frivolous appeal from a non-appealable order has no merit.<sup>5</sup> The court of appeals, in its order dated June 25, 1982, properly found the appeal filed by Karapinka from denial of his motion for judgment to have been taken from a non-appealable order.

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5. Karapinka's reliance on *District 65, Distributive, Processing and Office Workers v. McKague*, 216 F.2d 153 (3d Cir. 1954) is misplaced. In *District 65*, an appeal was taken from a nonfinal order. During the period of time between oral argument, wherein the appellate court indicated that the appeal should be dismissed as not in conformity with Fed. R. Civ. P. 54(b), and the entry of the order of dismissal, the district court entered an order providing Rule 54(b) certification. The Third Circuit, on the petition for rehearing, held that the district court was without jurisdiction to enter the Rule 54(b) order or any order which would affect the status of the appeal. The court added that even if jurisdiction did exist, the order was improvidently entered. *District 65* does not hold that a notice of appeal completely divests the district court of jurisdiction. Indeed, subsequent cases decided by the Third Circuit and its district courts have, contrary to Karapinka's interpretation, followed the general rule that a district court is not without jurisdiction to proceed merely because a notice of appeal has been filed. *See Guadiosi v. Mellon*, 269 F.2d 873 (3d Cir.), *cert. denied*, 361 U.S. 902 (1959); *Donovan v. Metal Bank of America, Inc.*, 521 F.Supp. 1024, n.1 (E.D. Pa. 1981); *accord, Cochran v. Birkel*, 651 F.2d 1219 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982), and cases cited therein.

Reviewing these facts it becomes apparent that Karapinka did not meet his burden of providing the court of appeals with any of the extraordinary circumstances necessary to justify the issuance of a writ of mandamus. Accordingly, the court of appeals acted properly in denying Karapinka's petition for such relief.<sup>6</sup>

## II.

**The issues raised in Point II of Karapinka's petition are not properly before this Court.**

In Point II of the petition for a writ of certiorari, Karapinka raises numerous arguments which are not properly before this Court. The only relevant issue before the Court is whether the Court of Appeals for the Third Circuit properly denied Karapinka's petition for a writ of mandamus. The arguments raised by Karapinka in Point II of the petition concern prior decisions of both the district court and the court of appeals which had no bearing on the summary judgment motion filed in the district court and consequently had no bearing on the denial of the petition for a writ of mandamus. Moreover, to the extent that Karapinka seeks review of decisions which were issued more than ninety days prior to the filing of the petition for a writ of certiorari, the request for review is untimely. 28 U.S.C. §2101(c). Accordingly, there is no basis for Karapinka's request to this Court for review of those decisions and Union Carbide will not respond to those arguments on the merits.

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6. Karapinka's further argument that Fed. R. Civ. P. 56 allows for the filing of a motion for summary judgment even after the case has been dismissed is so frivolous as to need no rebuttal.

**CONCLUSION**

For all the foregoing reasons, respondent Union Carbide Corporation respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**CORPORATE DISCLOSURE STATEMENT**

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Pursuant to Rule 28.1 of the Rules of the Supreme Court, the following is a listing naming all subsidiaries (except wholly-owned subsidiaries), and affiliates of Respondent Union Carbide Corporation: Arizona Welding Equipment Co.; Bayox Inc.; Colombia Welding Products, Inc.; Miami Welding Supply, Inc.; Niject Services Company; Wellnite Company; DCS Capital Corporation; Petromont and Company Limited; Union Carbide Canada Limited; Acetogen Welding Supplies Ltd.; Brouillette Gas & Welding Supplies Ltd.; Buckwold Welding Supplies Ltd.; Canadian Welding Gases Limited; Centrale S.P.C. Inc.; Chicoutimi Silicon Ltd.; Consumers' Welding Supplies Limited; Dominion Viscose Products Limited; Graphic Flexible Packaging

Ltd.; Medigas (Alberta) Ltd.; Medigas Atlantic Limited; Medigas (New Brunswick) Limited; Medigas (Newfoundland) Limited; Medigas Pacific Limited; Medigas (Saskatchewan) Limited; Medigas (Territories) Limited; Metalwelding Supply Company Limited; Rocky Mountain Welding Products Limited; St. Lawrence Welding Products Ltd.; Terra Nova Mechanical Equipment Limited; Tri-Valley Welding Products Incorporated; Union Carbide Canada Mining Limited; Vandry Gas & Welding Products, Ltd.; Welders Supplies Limited; Carbographite Limited; Chrome Corporation (South Africa) (Proprietary) Limited; Elektrode Maatskapy Van Suid Africa (Eiendoms) Beperk; Zimbabwe Mining and Smelting Company (Private) Limited; Karaj Road Property Company Limited; Union Carbide Egypt S.A.E.; Union Carbide Ghana Limited; Ucar Plastics (Ghana) Limited; Union Carbide Kenya Limited; Union Carbide Nigeria Limited; Union Carbide Sudan Limited; Union Carbide Yemen Ltd. (In Formation); P.T. Agrocab Indonesia; P.T. Karmi Arafura Fisheries; Nippon Unicar Company Limited; Sony-Eveready Inc.; Union Carbide Australia & New Zealand Limited; Chemos Industries Pty. Limited; Delvan Pty. Limited; Joint Industries (HYCEL) 1970 Limited; Union Carbide Australia Limited; Union Carbide New Zealand Limited; Union Carbide Ceylon Limited; Union Carbide Formosa Co., Ltd.; Union Carbide India Limited; Nepal Battery Company Limited; Union Carbide Malaysia Sdn. Bhd.; Union Polymers Sdn. Bhd.; Union Showa K.K.; Argon, S.A.; La Littorale S.A.; Unifos Kemi AB; Unifos Kemi Norsk A/S; Unifos Kemi A/S; Skandinaviska Polypropylene Aktiebolaget; Oy Unifos AB; Unifos U.K. Limited; Unifos G.m.b.H.; Unifos Chimie France; Calida Gas B. V.; Indugas N. V.; Union Carbide France, S. A.; Union Carbide Iberica, S. A.; Societe Civile des Produits Lifine; Tungsmina Desenvolvimento de Industrias Minerais Ltda.; Union Carbide Argentina, S.A.I.C.S.; Eletro Manganês Ltda.; Sociedad Anonima White Martins; Eletrometalurgica Saudade Ltda.; Oxigenio Edy S.A.; S. A. White Martins Nordeste.